Supreme Court, U.S.
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No. 07-132

In The Supreme Court of the United States

2025 EMERY HIGHWAY, LLC,

Petitioner,

v.

BIBB COUNTY, GEORGIA, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When a Georgia sheriff's particular area of law enforcement activity concerns enforcing his county's ordinances (in this case, ordinances regulating alcoholic beverages and adult entertainment), is he acting as an "arm of the state" and thus entitled to Eleventh Amendment immunity?

PARTIES TO THE PROCEEDING

Petitioner is 2025 Emery Highway, LLC, a Georgia limited liability company d/b/a Club Exotica ("Club Exotica" or "the club"). Respondents are Bibb County, Georgia ("the County") and Bibb County Sheriff Jerry M. Modena, Sr., both in his official and individual capacities ("BCSO" or "the Sheriff").

CORPORATE DISCLOSURE STATEMENT

There are no parent corporations or publicly held companies owing 10% or more of the stock of the corporate petitioner.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals is unreported and reproduced in the appendix (App. 2). The opinion of the district court from which this petition arises is unreported and reproduced in the Appendix (App. 4). The order denying the petition for rehearing en banc is reproduced in the Appendix (App. 12). The Eleventh Circuit's judgment affirms the District Court's non-final, 88-page partial summary judgment opinion which is published at 377 F. Supp. 2d 1310 (M.D. Ga. 2005).

JURISDICTION

The judgment of the court of appeals was entered on February 22, 2007 (App. 1). On May 1, 2007, the court denied Petitioner's timely petition for rehearing en banc (App. 12). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

Constitution of the United States:

U.S. Const. amend. I
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U.S. Const. amend. XI

STATEMENT

This case has revolved around Bibb County's adoption and enforcement of ordinances governing alcoholic beverages and adult entertainment. No one disputes that. What is disputed is whether a Georgia sheriff acts as an "arm of the state" when enforcing local laws regulating alcoholic beverages and adult entertainment *at the request of the County* – so long as the "violations" are given a state-law label.

County's regulation of alcohol

Respondent Bibb County ("the County"), like many local governments in Georgia, regulates and licenses both alcoholic beverages and adult entertainment under comprehensive licensing schemes.

The Bibb County Sheriff's Office ("BCSO" or "the Sheriff") handles the "nuts and bolts" of the County's alcohol-licensing process. [Doc. 26 at 13-18; Doc. 156 at 16-17.] If, for example, the Sheriff approves a license application or renewal, it is almost always issued. [Doc. 26 at 11-13.] In fact, unless the Sheriff "disapproves" a license, no formal hearing on that license application takes place. *Id.* When the Sheriff disapproves, the County's Board of

Commissioners ("the Board") rubber-stamps his recommendation of disapproval and offers the applicant a "rehearing." [Doc. 156 at 17.]

Occasionally, if an establishment is receiving a number of police calls, the Sheriff will get involved, and may choose to initiate a suspension or revocation of an alcohol license where there is a violation of any law. [Doc. 149 at 42.] If the Sheriff is going to "disapprove" a license application, he states his reasons in a letter so that the Board knows why he is doing it. [Doc. 156 at 16-17.]

In addition to handling the licensing application process, the BCSO monitors establishments for compliance with the County's alcohol code. *See* O.C.G.A. § 3-2-31(a) ("Upon a request by the governing authority of any municipality or county, the sheriff . . . may and, in the case of an order from the Governor, shall direct special agents and enforcement officers of the department to render assistance in: (1) Any criminal case; (2) The prevention of violations of law; or (3) Detecting and apprehending those violating any criminal laws of this state, any other state, or the United States."); *compare McMillian v. Monroe County*, 520 U.S. 781, 786 (1997) ("[O]ur understanding of the actual function of a governmental official, in a particular area, will necessarily be dependant on the definition of the official's functions under relevant state law."); *see* Doc. 33 (detailing BCSO's role in enforcing county alcohol ordinances at: Ex. A, ¶¶ 5-6; Ex. B, ¶¶ 10-12; Ex. C, ¶¶ 5, 11).

The initial alcohol license application

In February 2001, Petitioner 2025 Emery Highway, LLC ("Club Exotica" or "the club") applied for an alcoholic beverage license from the County. [Doc. 1, ¶ 21.] In response

Captain Stella Davis instructed Lieutenant Brooks Peterson (both of the BCSO) to investigate it. [Doc. 150 at 6-7.] Though Lieutenant Peterson did not routinely investigate alcohol license applications, *id.* at 8-10, he was told to check Club Exotica's investors "to see if there was anything that would prevent them from getting a liquor license." *Id.* at 9. He interviewed a representative of the club, John Fry, and concluded that no reason existed to deny the club's license application. He then provided his notes (saying as much) to Captain Davis and "told her that [he] could find no reason why this man couldn't get a liquor license in Bibb County." [Doc. 150 at 11-12, 44 and 46.] Yet the license did not issue.

Instead, in April 2001, the Sheriff opened an "investigation" of Club Exotica. [Doc. 156 at 34-35.] The next month Captain Davis recommended to the Sheriff (by memo) that he deny the Club's alcohol license application, noting that Fry's business card advertised Web sites which promote adult entertainment. [Doc. 154 at 47.] Both her investigation and recommendation were unknown to Lieutenant Peterson. *Id.* at 47-48.

Later in May the County denied the club's alcohol license application based upon an alleged failure to meet the civil disability provisions of Bibb County's alcoholic beverage code ("the Alcohol Code"). [Doc. 1, ¶ 22; Doc. 6, ¶ 6.] Specifically, the County stated "the reputation and the character requirements of [Fry] and Mr. Cornetta fail to meet the requirements of Sections 3-35 and 3-36 of the Code of Ordinances of Bibb County, Georgia. . . ." [Doc. 3, Ex. A at 2; Doc. 1, ¶ 22; Doc. 6, ¶ 22.] These sections require that an applicant be of "good moral character" [Doc. 1, Ex. D, Code § 3-35], and have "no record or reputation for law violation generally." *Id.*, Code § 3-36(9).

Neither Club Exotica nor its managing members had ever suffered a criminal conviction or even an alcoholic beverage law violation at that point. [*See, e.g.*, Doc. 4, ¶ 16.]

The previous lawsuit

On June 13, 2001, Club Exotica sued Bibb County for injunctive relief based upon what it believed was a pretextual denial of its alcoholic beverage license application. [Doc. 1, ¶ 23; Doc. 6 ¶ 23.] That case settled only after Club Exotica agreed not to offer "adult entertainment" as defined by the County's ordinances. [Doc. 1, Ex. E, ¶ 2.] Though the club agreed to this condition, it nonetheless thought it could offer mainstream, nude-dance entertainment as contemplated under the Alcohol Code, namely, § 3-71(c)(4). *See* App. 14 (the "mainstream exception"). [Doc. 1, ¶ 33; Doc. 4, ¶ 15.]

On October 24, 2001, the County issued a 2001 alcoholic beverage license to the club [Doc. 1, ¶ 25], which opened that day. *Id.*, ¶ 27. From day one, Club Exotica maintained weekly sales journals tracking gross income from all sales, including income from alcoholic beverages, non-alcoholic beverages, food, cigars, dance performances, and door cover charges. *Id.*, ¶ 28. [Doc. 4, ¶ 9.] By April of 2002, the club's sales figures showed that, since opening on October 24, it had derived less than 20% of its gross income from the sale of alcoholic beverages. [Doc. 1, ¶ 29; Doc. 4, ¶ 10.][1]

[1] The County disputes this fact. [*See* Doc. 104 at 7, ¶ 21, and at 9, ¶¶ 27-30.] It believes that the Club's accounting methods "involved fictitious bookkeeping entries," which skewed gross revenue attributable to alcohol sales. *Id.*, ¶ 30. Thus a question of fact remains as to

(Continued on following page)

With this sales track record, Club Exotica believed that it would derive less than 20% of its gross annual income from the sale of alcoholic beverages. [Doc. 1, ¶ 30.] If true, the club was not (or would not be) subject to the nudity ban found in § 3-71(c) of the Alcohol Code because the code section did not "apply to the premises of any mainstream performance house or museum which derives less than twenty (20) percent of its gross annual income from the sale of alcoholic beverages." *Id.*, ¶ 32; *see* App. 14.

Though Club Exotica believed that it met § 3-71(c)(4)'s exception [*see* Doc. 3 at 6-10], it also believed that the County would arrest, prosecute, or take adverse administrative and punitive actions against it, its managers and performers if the club attempted to offer nude dance performances [Doc. 1, ¶ 33; *see* Doc. 4, ¶ 15]. (The County has never identified an administrative remedy for verifying "mainstream" compliance.)

This lawsuit:
civil defense *versus* civil conspiracy

On April 16, 2002, Club Exotica again sued Bibb County, seeking primarily declaratory and injunctive relief from ordinances which, it believed, the County would enforce if the club attempted to dance nude while serving alcoholic beverages. [Doc. 1.] To defend the suit, the County hired O. Hale Almand ("Almand") of the law firm of Almand & Wiggins. Before filing an answer, Almand asked "for the assistance of the sheriff's office to investigate the facts concerning [Club Exotica's] lawsuit," and the

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whether the club derives less than 20% of its gross annual revenue from the sale of alcoholic beverages. [*See, e.g.*, Doc. 169, ¶ 15; Doc. 4.]

Sheriff agreed to do it. [Doc. 156 at 37-38, 40-41; *compare* Doc. 162 at 16-17; Doc. 151 at 36-38.]

Whatever his motive, when the Sheriff began investigating Club Exotica, his office did not possess any specific information about illegal drugs or prostitution at the Club. [Doc. 165 at 10-13.][2] One investigator was told simply that the BCSO was beginning an open-ended, "new detail" focusing on Club Exotica rather than on any particular person. [Doc. 153 at 6-7.][3]

Beginning on about May 10, 2002, BCSO undercover investigators began to work the club at least twice a week, reporting to lieutenants who in turn reported to Captain Lynn Eason who reported to Major David Montford. [Doc. 158 at 21; Doc. 162 at 17-18.] During the year, the Sheriff, Chief James W. Allen and Almand met with other members

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[2] While the BCSO was investigating Club Exotica, the business in town most similarly situated to it [Doc. 162 at 93; Doc. 149 at 25-26; Doc. 166 at 36; Doc. 167 at 47], a nightclub known as South Beach, was experiencing problems with drugs, beatings, rapes, stabbings, underage sales and racial discrimination [*see* Doc. 148 at 27; Doc. 162 at 86-90; Doc. 163 at 9-10; Doc. 165 at 21; Doc. 166 at 29, 33-34, 70-71; Doc. 167 at 50.] The Sheriff knows the owner of South Beach, Donnie Giles, through business [Doc. 149 at 33] and is aware of the bar's problems [Doc. 165 at 25; Doc. 167 at 33-34], but believes that his office can talk out any problems with the bar [Doc. 156 at 51; Doc. 167 at 60, 64].

[3] Almand's roles in communicating with the Sheriff (1) to advise in the undercover criminal investigation, and (2) to defend this civil lawsuit are, by the Sheriff's account, inseparable. [*See generally*, Docs. 20, 33 (Ex. B, ¶¶ 4-5), & 37.] The BCSO does not have its own attorney, but rather, it uses the County's attorney when it needs legal advice. [Doc. 156 at 58.] The County's law firm is not on a retainer agreement with the BCSO [Doc. 156 at 59]; the County Attorney is paid by the County. *Id.* In 2002 the Sheriff testified that his investigation "intensified" after this lawsuit was filed. [Doc. 26 at 7-8; Doc. 156 at 67.]

of the BCSO's Narcotics and Vice Unit to discuss the Club Exotica Investigation. [Doc. 164 at 12-13.]

About this time, while the BCSO and the County (through Almand) were organizing the County's civil defense (or conducting an undercover criminal investigation), Club Exotica was pressing for both declaratory and injunctive relief: the right to operate under the mainstream exception of the Alcohol Code. [*See* Docs. 2-4 and 8; Doc. 231 at 12-13.] Anticipating the County's argument that its adult licensing and zoning codes (together "the Adult Code") prohibit nude dancing in establishments licensed to serve alcoholic beverages, the club challenged the validity of enforcing the Adult Code against it. [Doc. 3 at 15-24.]

The 2002 amendments to the Adult and Alcohol Codes

Within weeks after learning of the club's intent to offer mainstream nude dance entertainment, on May 14, the Board voted to amend § 3-71(c) to "require that any establishment seeking to qualify as a traditional theater must first meet the definition of traditional or live theater (mainstream performance house)," and secondly, "derive less than 20 percent of its gross annual revenue from the sale of alcoholic beverages." *See* App. 20. It also amended the ordinance to include "the cost of admission to the establishment, whether by cover charges or tickets," in the "annual revenue from the sale of alcoholic beverages." *See id.*

The Board adopted this content-based ordinance on Almand's advice [Doc. 27 at 7-9; Doc. 24 at 6], and, admittedly, it had little or no input in how the ordinance was drafted, why it was needed [Doc. 27 at 21-22], or how it

functioned [*see, e.g.*, Doc. 24 at 10; Doc. 27 at 25-27]. Nor did the Board review any studies detailing so-called "secondary effects" of adult-oriented businesses before adopting the ordinance [Doc. 231 at 19], though at least one commissioner believed that the ordinance would curb primary effects associated with drinking while viewing nude dancing [Doc. 27 at 19]. The Sheriff does know how to enforce the mainstream exception; in fact, he testified that he was unaware of anybody in the county that knew how to enforce the mainstream exception besides Almand. [Doc. 26 at 27.]

The Investigation

The BCSO assigned Investigator Herman Sampson as lead investigator of the "Club Exotica Investigation" [Doc. 181, ¶ 4]. His assignment was to visit the club and observe how much alcohol was being sold; how much food was being consumed; what the entertainers were wearing and what they were doing; and look for illegal activity. *Id.* Investigator Sampson's supervisors also instructed him to lure the club's female performers to engage in illegal activity. *Id.*, ¶ 5. But he was not tasked to build a case against any specific dancer, *id.*, ¶ 8; rather, Sampson was instructed to solicit "violations" to support an effort to shut down Club Exotica. *Id.*, ¶ 9. Sampson reported any findings to Major Montford and the Sheriff. *Id.*, ¶ 13.[4]

Throughout the year, BCSO's undercover officers worked to identify female dancers by their "real" names so

[4] If no violations were observed, an incident report was not prepared. [Doc. 104, Attachment # 9 at 67.] No log books of visits to the club were kept, either. *Id.*

that they could run background checks "to see if they had been arrested before, or if they were on probation or parole, or if they had outstanding warrants." *Id.*, ¶ 14.[5] The BCSO did not limit its investigation to female dancers and employees of the club. It investigated club patrons, too.

On numerous occasions BCSO patrol officers trailed customers and employees who were leaving Club Exotica, looking for benign infractions for which to pull them over. [*See* Doc. 147 at 24; Doc. 181, ¶ 17; Doc. 166 at 49-50, 53-59.] The BCSO's tactic to stop cars for pretextual reasons was ordered by Captain Eason in a memo dated June 4, 2002, which was distributed to all officers working "the Café [sic] Exotica case." [Doc. 162 at 52; Doc. 164 at 69-70.] When asked whether the BCSO was pulling over the club's patrons and employees to find favorable witnesses for this lawsuit, Lieutenant Christopher Thomas replied, "I can't remember." [Doc. 164 at 77; *see also id.* at 66, 73; *compare* Doc. 165 at 73-74.] But Thomas did issue a memo to Major Montford (in May or June 2002) detailing license tags run and cars stopped at Club Exotica on June 11, in which he stated that "[a] more detailed report will be completed next date." [Doc. 147 at 30-36.] He also said that the officers who stopped patrons did not "want to do a whole bunch to spook them so they can go back. . . ." [Doc. 164 at 61-62.]

As it turns out, BCSO did pull over cars to find witnesses to defend this lawsuit. [Doc. 181, ¶ 18; *see also* Doc.

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[5] The BCSO uses Bibb County's mainframe computer system and personnel for data storage. [Doc. 156 at 24.] The BCSO does not pay for that service because, as the Sheriff points out, he is "a county officer." *Id.*

158 at 15-17.] In response to the club's first interrogatories, which asked the County to identify anyone who had "knowledge of any fact relevant to [Club Exotica]'s claims," the County listed a number of individuals. [Doc. 177, No. 3.] Of those, 25 were not employed by Bibb County government; they were persons whose names, addresses, social security numbers and other private information were obtained by the BCSO from vehicle tag checks. [*See* Doc. 185 at 24-25.] Their vehicle details (including lien-holder information) and criminal histories (including probation reports) were obtained because their cars were parked in Club Exotica's parking lot.[6] Depending on their criminal history, these people were subpoenaed by the County for deposition in this lawsuit. [*See* Doc. 162 at 67-69; *see also* Doc. 33, Ex. A, ¶ 7; Doc. 54 & 61; *see also* Doc. 156 at 103.] When these witnesses appeared for deposition, BCSO's Captain Eason attended as the County's "representative." [Doc. 61 at 2.] The club's attorney objected to the intimidation tactic. *Id.*

The Club's decision to "go nude" and the County's decision to revoke the liquor license

On July 3, 2003, the district court entertained oral argument on the motion for declaratory and injunctive relief [Doc. 62], and denied the motion by order one week later [Doc. 65]. In that order the court stated that the club's fear of "possible criminal sanctions" was "unfounded." *Id.* at 11. The court reached its conclusion after Almand "assured the Court" that no such actions would be

[6] One witness, a customer, who the County deposed, Jessie Williams, told the County attorney that they should know his personal information because they ran his tag number. [Doc. 176 at 9.]

taken against Club Exotica or its employees if it attempted to operate as a mainstream performance house. *Id.* Rather Almand

> explained that in the event Club Exotica attempted [to operate a mainstream performance house], the County would conduct its own investigation as to whether the requirements of the exception were being met. If, after this investigation, the County concluded that Club Exotica was operating in violation of the Alcoholic Beverage Code, it would provide Club Exotica with reasonable notification that its alcoholic beverage license may be revoked. At that time, a license revocation hearing, 'meeting all due process requirements,' would be promptly scheduled and held.

Id. at 11-12 (emphasis added).

Later that week, on July 17, Club Exotica began offering nude-dance entertainment under the mainstream exception. [Doc. 71, ¶ 2.] The next Tuesday, July 22, the Sheriff sent letters to both the Board and County's Tax Commissioner. *Id.* (Almand helped draft these letters), asking them to revoke (and deny, respectively) the club's alcohol licenses based upon "conduct of the entertainers and other employees of Club Exotica" going back to October 24, 2001 (*i.e.*, the club's opening date). *Id.* The Sheriff alleged that the club had violated the Alcohol Code, namely, §§ 3-33, 3-55, 3-36, 3-37, 3-38, 3-39, 3-53, and 3-71(c). *Id.* In that letter, he also accused the club of violating the "public indecency and obscenity laws of the state [sic] of Georgia," including O.C.G.A. § 16-6-8. *Id.*; App 26. The Sheriff did not, however, write to the Georgia Department of Revenue ("DOR"), much less inform the DOR about these alleged state-law violations.

On July 22, the Sheriff and Almand attended a "committee" hearing of the Board regarding Club Exotica's alcohol license. [Doc. 156 at 61-63.] The Sheriff recommended that the Board deny the license. *Id.* The Board accepted his recommendation and, through Almand, informed the club that it was "entitled to a hearing on both the denial . . . and the revocation . . . pursuant to section 3-52 of the Code of Bibb County, Georgia." *Id.*

In response to the County's letters regarding the proposed license revocation appeal hearing, Club Exotica wrote a letter on August 15, 2003 (and faxed it to Almand that morning), expressing concerns about the nature and justification of the hearing. [Doc. 67, Ex. B.] In that letter the Club threatened to sue the Sheriff, the BCSO and the County for malfeasance in enforcing state and local laws, and objected to their adverse licensing decisions which it believed were in direct retaliation for exercising its First Amendment rights. *Id.*

Planning the Raid

As it happens, on August 15, the Sheriff and Almand began planning a raid of Club Exotica. [Doc. 151 at 88-89; Doc. 75 at 60-61, 71-72; *but see* Doc. 161 at 12, 20-21, 30-31.][7] At Almand's direction, the new lead investigator of the Club Exotica Investigation, Joseph Whitehead, prepared a synopsis of the investigation covering the BCSO's undercover visits between July 30 and August 15 of 2003.

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[7] On summary judgment, the respondents averred that the club's 8/15/03 letter "invited" the Sheriff "to enter Exotica and make arrests." [Doc. 207 at 17-18.] The parties dispute whether the club invited the BCSO to raid it.

[Doc. 153 at 70-74.] Almand decided which "charges" to write into the synopsis (i.e., state-law crimes of masturbation for hire (App. 29), public indecency (App. 26) and obscenity), presumably attempting to exclude violations of the County's Alcohol Code. [*Id.*; *but see* Doc. 1, Ex. D, Code §§ 3-35, 3-36, 3-38 and 3-53 (allowing suspension or revocation of county alcohol license based upon violations of state law).] After reviewing Almand's synopsis [Doc. 156 at 71-72], the Sheriff granted Major Montford's request to use the S.W.A.T. team to raid the club [*Id.* at 64, 66; Doc. 163 at 13-14].

Major Russell Nelson (who oversees BCSO's Corrections Division) agreed to loan Deputy Tracy Watkins, a female, to participate in the raid. [Doc. 159 at 7-8.] Deputy Watkins worked at the Bibb County jail, but the vice unit requested her because the BCSO planned to arrest females at the club. [Doc. 157 at 25-26.] The last-minute request intruded on what would have been Deputy Watkins' off-day, but she agreed to help because, as she was told, she would "pat down" females and "go with them when they go to jail." [Doc. 157 at 26-30.]

The Sheriff raided the Club the next night. The fruits of this raid (and the predicate synopsis for the raid) would serve as the bases for revoking Club Exotica's alcohol license. [Doc. 104, Attachment # 9 at 16-17, 54-56.]

The Raid

On August 16, the S.W.A.T. team and Peach County Sheriff's K-9 Unit were notified that they would participate in the raid. [Doc. 150 at 21; Doc. 172, ¶ 6.] A prebriefing was held that night, and about 35 to 40 personnel attended [Doc. 150 at 25-26], including members of both

the S.W.A.T. team and Middle Georgia Drug Task Force ("MGDTF") [Doc. 163 at 16]. Major Montford instructed S.W.A.T. to perform an unusual "soft entry" of the club [Doc. 163 at 17], which means that guns are not drawn but people cannot leave. The team would wear full S.W.A.T. regalia, including bullet-proof vests and sidearms, but no long rifles or helmets. [*Id.*; Doc. 150 at 40.][6] When asked why the respondents raided the club, Lieutenant Peterson testified he thought that "it had something to do with complete nudity which was against the agreement or something that they had when they issued the license." [Doc. 150 at 30-31.]

At the prebriefing, the S.W.A.T. team was not advised about drug activity, violent crimes or, for that matter, any felonious activity at Club Exotica. [Doc. 150 at 31-33.] Nor were S.W.A.T. or MGDTF briefed about any suspects who might be at the club. [Doc. 150 at 43.] What S.W.A.T. and MGDTF were ordered to do was secure the manager's office [Doc. 150 at 33] and, at the Sheriff's direction, make full custodial arrests of the female dancers [Doc. 156 at 113-114]. Less than one hour later, everyone (more than 30 officials) went to the staging area at the Coliseum parking lot near the club. [Doc. 163 at 19; Doc. 161 at 21-22.] From this area the S.W.A.T. team leaders watched the club to ensure that there were customers inside before the take-down. [Doc. 150 at 22-23.]

The S.W.A.T. team entered Club Exotica around midnight, dressed in full regalia and armed with shotguns

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[6] This would be the first "soft entry" that Lieutenant Peterson had seen in his 24 years of S.W.A.T. participation. [Doc. 150 at 28-29, 53; 163 at 18.] Had the S.W.A.T. team's commander had his druthers, he would have planned for a hard entry. [Doc. 163 at 17-18.]

and billy clubs. [Doc. 71, ¶ 5.] The team ordered everyone to freeze, *id.*, ¶ 8, turned the house lights on and the music off [*see* Doc. 161 at 23; Doc. 71, ¶ 3]. Once the lights were on, all females were taken to a general area where officers attempted to separate the dancers from the patrons. As one lieutenant explained it, BCSO segregated the dancers because "they were going to make cases against them and didn't want them to get mixed up with the other ones. . . ." [Doc. 150 at 39.] Investigator Whitehead left the building to get booking sheets, notices of seizure forms, and ticket books. [Doc. 153 at 91.] No one was allowed to enter or leave the club. [Doc. 161 at 24; Doc. 153 at 88.]

Lieutenant Billy Johnson photographed the manager's office, including the pictures on the wall which contained personal information on the club's female employees,[9] and he photographed all patrons in the club "for ID purposes." [Doc. 151 at 100-107.] Lieutenant Johnson says that he and Lieutenant David Davis photographed the patrons because most of them did not have any form of identification. [*See* Docs. 151 at 101-03, 110; 153 at 94; *but see* Doc. 161 at 38.] He admitted that BCSO does not usually take pictures when issuing arrest citations. [Doc. 151 at 102-107.]

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[9] The parties dispute whether the Club's management authorized the BCSO to search the manager's office. [*Compare* Doc. 71, ¶¶ 5, 7-9 and 18 *with* Doc. 161 at 41-43; *see also* Doc. 207 at 12 (response to statement nos. 15-16).] Club Exotica had an elaborate security system with monitors in the manager's office, and cameras situated around the Club. [Doc. 153 at 98; Doc. 169, ¶ 5.] Pictures, names, and phone numbers of the dancers were on index cards which were posted in the manager's office. There were also "rules of the club" posted in the office. For each dancer, the card read "Rules read by [blank]." About 50-75 index cards were seized by the BCSO. These cards have never been returned. [Doc. 153 at 99-100, 108-109; Doc. 169, ¶ 21.]

The BCSO did not just photograph the premises. [*See* Doc. 210.] A group of officers ushered the manager-on-duty around the club, instructing him to open locked doors (such as the manager's office), where they proceeded to open file cabinets and desk drawers. [Doc. 71, ¶¶ 6-8, 18.] When the manager asked the officers whether he was under arrest, one officer replied "No," but told the manager that if he did not cooperate, he would be arrested. [Doc. 70, ¶ 5.] When the manager asked for a search warrant, one BCSO officer replied, "I don't need one." [Doc. 71, ¶ 9.]

Eventually two K-9 Units arrived to sniff around the club. [Doc. 172, ¶¶ 10-12.] The dogs searched the entire club, including the manager's office and female dressing room. [Doc. 71, ¶ 14.] Officers were searching in the female dancers' purses as well. [Doc. 71, ¶ 15.] The dogs also worked the club's parking lot [Doc. 71, ¶ 16; Doc. 172, ¶ 10], while other officers wrote down license tag numbers of cars in the lot [Doc. 71, ¶ 17].

In all, 15 females were arrested [Doc. 164 at 39], which, according to one undercover officer, included every female dancer working that night.[10] [Doc. 75 at 35.] Of these 15 females, 12 were charged with masturbation for hire, which is a two-party crime under Georgia law. *See* O.C.G.A. § 16-6-16 (App. 24). The females were then transported to the Bibb County jail. [Doc. 164 at 42-43; Doc. 165 at 67.]

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[10] It is unclear if every female on the premises was arrested. When asked why some females were not arrested, one deputy answered that they probably "just got there" [Doc. 157 at 39-40; *but see* Docs. 68, 70 & 72], and another testified that "some of them wasn't [sic] dancers" [Doc. 75 at 34].

About 10 to 12 male patrons were also charged with masturbation for hire. [Doc. 153 at 92-93.] But rather than going to jail, they were cited, photographed and released. [Doc. 161 at 25-26; Doc. 151 at 112-113.] Male patrons who cooperated were not even issued citations. [Doc. 207 at 10 (response to statement no. 11).] No one, however, was permitted to leave before the dancers went to jail. [Doc. 157 at 36; Doc. 161 at 27.]

The BCSO's explanation for taking the Club's female performers to jail, while releasing their male counterparts on citations, is inconsistent. Captain Godbee testified that "a lot of it would depend on whether or not they were locals, if we had good Ids." [Doc. 78, Ex. E at 41; Doc. 161 at 38.] Yet the females who were arrested produced identification; indeed they were permitted to go to the dressing room to get their purses for their driver's licenses or identification cards. [Doc. 150 at 50-51; Doc. 167 at 84-85.] The lead investigator, Whitehead, testified that the "jail count was high at the time for males." [Doc. 104, Attachment # 9 at 121.] Yet, on that day, Bibb County's jail was not overcrowded to the point where it was turning away male defendants. [Doc. 157 at 33-35; Doc. 159 at 9-10.]

By most accounts, the raid lasted between 2 and 3 hours. Though the S.W.A.T. team stayed at the club for what "seemed like forever" [Doc. 167 at 86-87], it left before the investigators [Doc. 163 at 21-22]. When the investigators left, the club was "pretty much shut down" [Doc. 150 at 49; Doc. 172, ¶ 13] and, in fact, empty [Doc. 71, ¶ 19].[11]

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[11] Though the Sheriff typically reviews over 100 alcohol license applications each year [Doc. 26 at 15-16], the County has revoked only

(Continued on following page)

The raid was filmed by Major Robert L. White, the BCSO's "unofficial videographer." [Doc. 195 at 2; Doc. 150 at 37-39.] Even though the BCSO was aware that White shot footage of the raid, it did not to instruct White to preserve the evidence [Doc. 195, Attachment # 1, ¶ 9], and he destroyed that tape [*Id.*, ¶ 10].

The Result

As it happens, Major White destroyed a videotape of the BCSO's largest raid *ever* – second only to the prison escape of Jamie Keel insofar as ranking BCSO personnel involvement. [*See* Doc. 150 at 8; *see also* Doc. 167 at 18.] Of the 15 dancers arrested that night, two were criminally tried and acquitted (one on directed verdict) in the Bibb County State Court. [Doc. 185 at 14-15.] The remaining dancers' charges were dismissed. [*Id.*; Doc. 191, Attachment # 1.]

The August 16 raid prompted Club Exotica to move for yet another TRO (the third such request). The district court denied motion, although it granted leave to amend the complaint to add the Sheriff and the Bibb County Sheriff's Office as defendants. After discovery the defendants moved for summary judgment. [Docs. 103-105.]

On July 11, 2005, the court entered an order granting summary judgment in favor of the defendants on all

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two or three alcohol licenses since 1993 [Doc. 149 at 55-56; Doc. 163 at 7-8]. Those clubs, like Club Exotica, offered nude dancing, including one with "girls down . . . from Atlanta dancing nude." *Id.* at 56. As far as raids go, the Sheriff cannot recall when the BCSO last raided an alcohol-licensed establishment, but it has raided strip clubs before. [Doc. 147 at 44-45.]

claims except the Fourth Amendment claim. *See 2025 Emery Highway, LLC v. Bibb County*, 377 F. Supp. 2d 1310 (M.D. Ga. 2005). While denying summary judgment on this claim, the court stated that "Sheriff Modena may have been acting as an 'arm of the State' rather than an agent of the County at the time the raid and search were conducted[,] and that he and the State would therefore be entitled to immunity for claims arising out this conduct." *Id.* at 1361. However, "the immunity issue was not properly raised and briefed by the parties on summary judgment," and therefore the court reasoned that it would "not attempt to fully address the issue here." *Id.* "Even so," the court said, "this threshold issue should likely be addressed at some point." *Id.*

On July 19, the defendants sought leave to file another summary judgment motion. [Doc. 199.] The court granted the motion insofar as it sought to brief sovereign and qualified immunity issues, but, to the extent that the defendants sought "to present evidence and re-argue whether liability should otherwise be imposed for the alleged Fourth Amendment violation," the court denied it. [Doc. 200 at 2.]

On August 3, the defendants again moved for summary judgment on the club's Fourth Amendment claims. [Docs. 203-205.] On March 15, 2006, the court granted that motion. (App. 4.) Judgment was entered on the same day. *Id.* In an unpublished opinion issued on February 22, 2007, the Eleventh Circuit Court affirmed the judgment. (App. 2.)

Club Exotica was forced to close because of poor business following the raid and loss of its alcohol license. South Beach is still licensed to sell alcohol. [Doc. 156 at

50-51.] Presumably, if South Beach experiences more problems, the Sheriff will speak with the owners again. [Doc. 67, Ex. A; Doc. 104, Attachment # 9 at 62.]

REASON FOR GRANTING THE PETITION

The decision below conflicts with *McMillian v. Monroe County*, 520 U.S. 781 (1997)

The Sheriff, his department and the County – jointly represented from beginning to end – together carried out the County's stated policy of banning nude dancing in alcohol-licensed establishments. As the Sheriff testified:

> we're the ones that initiated the first denial of this [alcohol] license, and we were the ones that had a stake all the way through into whether Exotica was going to adhere as the other places do that file for these applications, so you can't separate us that, you know, we're out there working for the commission and we're out there working for the sheriff's office.

[Doc. 156 at 103-04.]

This open-ended "investigation" and consequent raid were inseparable; indeed, as the Sheriff testified, the raid was the culmination of the investigation:

> What eventually led to the arrest was we saw an increased, and the investigation I think you referring to was because we saw that the club was not complying with the agreement that we had made, and that's why you saw the state charges made, because we were still operating there with a special license that had been given to you by the commission. But once you started violating

> the state law, then we went on and made the case.

Id. at 70.

It cannot be said that, as a matter of law, the BCSO's actions constituted State policy. Even the Sheriff admits that his office was "working for the commission" throughout the Club Exotica Investigation by providing investigative services for the County. [*See* Doc. 33, (Ex. A, ¶¶ 5-6), (Ex. B, ¶¶ 10-12), (Ex. C, ¶¶ 5, 11).] Which is precisely what state law allows him to do. *See* O.C.G.A. § 3-2-31(a). The proper question, as Judge Anderson posed in his dissent to *Manders*, is

> whether the sheriff has carried his burden of proving that he is an arm of the state. In other words, the issue is not the state versus the county; rather, the issue is whether the sheriff is an arm of the state *vel non*. The mere fact that the sheriff is not the policymaker for the county commission, is not controlled by the county commission, and the fact that the county has no respondeat superior liability for judgments against the sheriff, do not, either singly or in combination, go very far toward establishing that a Georgia sheriff is an arm of the state.

Manders v. Lee, 338 F.3d 1304, 1331-32 (11th Cir. 2003) (Anderson, J., dissenting). The Seventh Circuit, too, has recognized this subtle pitch in determining the policymaking calculus in *Franklin v. Zaruba*, 150 F.3d 682 (7th Cir. 1998), where it held that an Illinois sheriff was not entitled to Eleventh Amendment immunity.

In granting summary judgment, though, the district court seemed to resolve the Eleventh Amendment immunity issue by asking only whether arrests were made for

violations of state law. (App. 9 ("A sheriff's power to make arrests for violations of state law is central to his role as an arm of the state.").) It then granted summary judgment to the Sheriff in his individual capacity because he "was not present for the raid" and thus "did not personally participate in the alleged search of the manager's office." (App. 10.) Nor, the district held, did "Sheriff Modena specifically order the alleged search of the manager's office, nor is there evidence that any policy or custom for which he was responsible directly led to the search being performed." *Id.*

A. The "two principles" guiding *McMillian*.

In *McMillian*, the sheriff's underlying function was investigating a state-law crime of murder, *id.* at 783, and the former death-row inmate who stood convicted of that murder alleged in his § 1983 suit that the sheriff (along with an investigator for the District Attorney's office and an investigator for the Alabama Bureau of Investigation) intimated the State's witness into making false statements and suppressed exculpatory evidence. *Id.* at 784.

The parties in *McMillian* agreed that the sheriff had "'final policymaking authority' in the area of law enforcement," but they disagreed "about whether Alabama sheriffs are policymakers for the State or the county when they act in a law enforcement capacity." *Id.* at 785 (footnote omitted).

This Court identified two principles that guided its decision in *McMillian*. The first is the oft-quoted premise that the "question is not whether Sheriff Tate acts for Alabama or Monroe County in some categorical, 'all or nothing' manner." 520 U.S. at 785. Rather, "Our cases on

the liability of local governments under § 1983 instruct us to ask whether governmental officials are final policymakers for the local government *in a particular area*, or *on a particular issue*." *Id.* (emphasis added) (citations omitted). The Court emphasized that the particular issue or area of activity was key to determining whether Alabama's sheriffs were acting on behalf of the State or the county, cautioning that a characterization of Alabama sheriffs would not hold true for every type of official action they engage in. With that in mind, the Court "simply ask[ed] whether Sheriff Tate represents the State or the county when he acts *in a law enforcement capacity*." *Id.* at 785-86 (emphasis added).

The second principle is really a recognition that the "inquiry is dependent on an analysis of state law." *Id.* at 786 (citations omitted). The Court cautioned that state law cannot "answer the question for us by, for example, simply labeling as a state official an official who clearly makes county policy." *Id.* But rather, "our understanding of the actual function of a governmental official, *in a particular area*, will necessarily be dependent on the definition of the official's functions under relevant state law." *Id.* (emphasis added).

B. The Eleventh Circuit grapples with *McMillian*'s principles.

Since *McMillian* the Eleventh Circuit has twice convened en banc to determine the Eleventh Amendment's relevance to Georgia sheriffs sued in their official capacities. The court has fractured both times. It did, however, devise a test to determine whether an entity is an "arm of the state," which asks (1) how the state defines the entity;

(2) where the entity derives its funds; (3) who is financially responsible for judgments against the entity; and (4) what degree of control the state maintains over the entity. *Manders*, 338 F.3d at 1309. In *Manders* this Court reviewed these factors and held that a Georgia sheriff functioned as a "state officer" in jail use-of-force policies, *id.* at 1328, but, mindful of this Court's admonition, the court said that it was not categorically holding that the sheriff acts as an "arm of the state" in all circumstances. *See id.* at 1309 n.9 (citation omitted).

In Georgia, as most everywhere, the Sheriff is a law enforcement officer. The Sheriff acts in his law enforcement capacity whenever he acts. This is true whether the sheriff is establishing a use-of-force policy at the jail (and in training and disciplining his deputies in that regard), *Manders*, 338 F.3d 1304, 1305-06 (11th Cir. 2003) (en banc), or whether he is overseeing policies and conduct regarding warrant information on computer-based systems (or the training and supervision of his employees in that regard), *Grech v. Clayton County*, 335 F.3d 1326, 1327 (11th Cir. 2003) (en banc).

It is at worse a legal fiction, and at best confusing, to separate the "law enforcement" function from the above functions, although the court of appeals has tried. *But see Manders*, 338 F.3d 1304, 1333 (11th Cir. 2003) (Barkett, J., dissenting) ("This analytical purpose is inevitably frustrated if the notion of function is conflated with what is more properly deemed a general attribute of the defendant's office, incidental to a range of official functions. Once our inquiry becomes tied to an attribute that is at issue in a variety of contexts, we face the danger of a sprawling inquiry spanning the whole corpus of state law.").

The "law enforcement capacity" language has created a categorical approach to Georgia sheriffs. According to the plurality of *Grech*, "a county has no authority and control over the sheriff's law enforcement function." *Id.* at 1347. When placed against the other *Manders* factors (which are largely static), the question becomes whether Georgia sheriffs can *ever* be final policymakers for the county when they act in a law enforcement capacity. Indeed Georgia's sheriffs have argued that under the Eleventh Circuit's cases, Georgia's sheriffs are always state actors, not county actors. *See, e.g.*, *Nichols v. Prather*, 2007 Ga. App. LEXIS 835 at *7-8 (Ga. Ct. App. July 16, 2007).

C. The Sheriff is not entitled to Eleventh Amendment immunity because he was not acting as an arm of the state.

It cheapens Eleventh Amendment principles – and guts § 1983's purpose – to hold the BCSO immune from constitutional violations because, according to the Sheriff, his deputies were looking only for state-law violations on the night chosen to raid Club Exotica. Certainly a reasonable person may conclude that the premeditated decision to arrest female performers for state-law violations was a ruse to invoke the Eleventh Amendment *in anticipation* of being sued for committing constitutional torts. The record supports this conclusion: almost all of the 15 female dancers were arrested without *arguable* probable cause (and none were convicted), and the club was searched from top to bottom without a warrant and without any exigencies. And the district court, at least on respondents' first motion, denied summary judgment on whether the raid violated the Fourth Amendment.

By focusing on the type of tickets (i.e., state law violations *versus* county ordinance violations) issued by the BCSO on August 16, the district court ignored both the substance of the violations and the disputed purpose of the raid. After all, the Sheriff did not arrest the female performers for fraud or assault, he arrested them for dancing (in what he believed to be) insufficient clothing and in an inappropriate manner. Just because he writes citations for state-law violations, the Sheriff does not lose his status as an arm of the county (and certainly that does not establish that he acted as an arm of the state), when, undisputedly, he acted at the County's and the County Attorney's request.

As Justice Ginsburg stated in her dissent in *McMillian*:

> If the Court means to suggest that Sheriff Tate should be classified as a state actor because he is enforcing state (as opposed to county or municipal) law, the Court proves far too much. Because most criminal laws are of statewide application, relying on whose law the sheriff enforces yields an all-state categorization of sheriffs, despite the Court's recognition that such blanket classification is inappropriate.

McMillian, 520 U.S. at 801 (Ginsburg, J., dissenting).

Entitlement to Eleventh Amendment immunity, this Court recognizes, is a "federal question can be answered only after considering the provisions of state law that define the agency's character." *McMillian*, 520 U.S. at 786 (internal quotation marks and citation omitted). In applying *McMillian*, the Eleventh Circuit has focused on a sweeping, static picture rather than focusing the particular function at issue. The question should not be whether

Georgia sheriffs are final policymakers for the State or the county when they act in a law enforcement capacity; the question should be whether a Georgia sheriff was the final policymaker for the State or the county when he or she acted in the particular issue in that case (i.e., meeting with the County's attorney to monitor and raid a strip club for violating a settlement agreement or violating county ordinances). *McMillian*, 520 U.S. at 784. The *McMillian* test may be sound, but the "law enforcement capacity" language has proven too abstract for "local realities."[12]

Investigating a murder is a far cry from investigating whether a nightclub is honoring a county settlement agreement to refrain from offering adult entertainment at its location. *Cf. McMillian* at 781 ("Third and most importantly, 'it shall be the duty of sheriffs in their respective counties, by themselves or deputies, to ferret out crime, to apprehend and arrest criminals and, insofar as within their power, to secure evidence of crimes in their counties and to present a report of the evidence so secured to the district attorney or assistant district attorney for the county.' ") (citation omitted). No State policy is carried out in this scenario – and certainly the respondents have not identified one if there was.

The Eleventh Circuit's struggle is understandable, given the uncertainty over what weight to accord the treasury and functional factors. Whatever the answer, it is far from clear when, if ever, a Georgia sheriff is properly considered a "state actor," and this admitted uncertainty should not trump other fundamental rights, as it has in this case. The Eleventh Amendment plays a role in the

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[12] *See Withrow v. Larkin*, 421 U.S. 35, 58 (1975).

Constitution, but so do the First, Fourth and Fourteenth Amendments. *See Manders*, 338 F.3d 1304, 1329-30 (11th Cir. 2003) (Anderson, J., dissenting) ("Of course, it is well established that an identical claim against a city or a county – *i.e.*, Manders' § 1983 excessive force claim for violating the Eighth Amendment by beating him while in jail – would not be barred by Eleventh Amendment immunity. I see no greater threat to the dignity of the state in the instant suit against the Sheriff of Clinch County."). Otherwise the State of Georgia can predetermine whether a federal claim under § 1983 is actionable in federal court.

CONCLUSION

The Eleventh Amendment was adopted as a result of the States' fears that "federal courts would force them to pay their Revolutionary War debts, leading to their financial ruin." *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 39 (1994). This historical purpose has not aged well; it has skewed the calculus for determining sovereign immunity. If there is any viability to the Court's function-by-function approach, this case was wrongly decided. The Eleventh Circuit has created a categorical holding that Georgia sheriffs acting in their "law enforcement capacity" are immune under the Eleventh Amendment from suit in federal court. Respectfully, this holding runs against this Court's jurisprudence, and, as here, offers the Eleventh Amendment as a sword, not a shield. Summary reversal is warranted.

For these reasons, Club Exotica asks the Court to grant the petition for writ of certiorari.

Respectfully submitted,

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United States Court of Appeals
For the Eleventh Circuit

No. 06-12268

District Court Docket No.
02-00125-CV-CAR-5

2025 EMERY HIGHWAY, L.L.C.,
d.b.a. Club Exotica,

Plaintiff-Appellant,

versus

BIBB COUNTY, GA, JOHN DOE,
in his official capacity with the Bibb County Sheriff's office, JERRY M. MODENA, SR., Sheriff, in his official capacity as the Sheriff of Bibb County,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Georgia

JUDGMENT

(Filed Feb. 22, 2007)

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: February 22, 2007
For the Court: Thomas K. Kahn, Clerk
By: Gilman, Nancy

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-12268
Non-Argument Calendar

D.C. Docket No. 02-00125-CV-CAR-5

2025 EMERY HIGHWAY, L.L.C.,
d.b.a Club Exotica,

Plaintiff-Appellant,

versus

BIBB COUNTY, GA,
JOHN DOE, in his official capacity with the Bibb County Sheriff's office, JERRY M. MODENA, SR., Sheriff, in his official capacity as the Sheriff of Bibb County,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Georgia

(February 22, 2007)

Before TJOFLAT, HULL and COX, Circuit Judges.

PER CURIAM:

The Plaintiff 2025 Emery Highway, LLC d/b/a Club Exotica ("The Club") contends on this appeal that the district court erred by: (1) denying The Club declaratory and injunctive relief that would permit it to offer nude

dance entertainment; (2) concluding that actions at The Club on August 16, 2003 did not amount to a prior restraint of Plaintiff's First Amendment rights; and (3) concluding that the Bibb County Sheriff's Office acted as an "arm of the state" and as such is entitled to Eleventh Amendment immunity from this damage claim.

Having reviewed the briefs and relevant parts of the record, we discern no reversible error.

AFFIRMED.

THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

2025 EMERY HIGHWAY, L.L.C. d/b/a Club Exotica, a Georgia Limited Liability Company,	
Plaintiff,	
vs.	**5:02-CV-125-2 (CAR)**
BIBB COUNTY, GEORGIA, et. al.	
Defendants.	

ORDER ON SUPPLEMENTAL MOTION FOR SUMMARY JUDGMENT

(Filed Mar. 15, 2006)

This case is again before this Court on Defendants' Supplemental Motion for Summary Judgment [Doc. 203]. In its July 11, 2005 Order on Defendants' Motion for Summary Judgment, the Court granted summary judgment for Defendants with regard to all claims except Plaintiff's claim that Defendants violated its Fourth Amendment rights during a raid by officers of the Bibb County Sheriff's Office on August 16, 2003. In denying summary judgment on this claim, the Court observed that the parties had not sufficiently addressed the Fourth Amendment claims in their arguments. Neither party had presented sufficient evidence of the nature and extent of the search to permit a proper review of the merits of the claim, and the briefs had not addressed the issues of sovereign and qualified immunity. In a subsequent order (Doc. 200), the Court granted Defendants leave to file a

supplemental motion for summary judgment, limited solely to the questions of sovereign and qualified immunity in the context of the Fourth Amendment claim. Defendants filed such a motion. Now, upon review of the arguments of counsel, the evidence in the record, and the relevant legal authorities, the Court finds that Defendants are entitled to judgment as a matter of law with regard to the sole remaining claim. Accordingly, Defendants' Supplemental Motion for Summary Judgment is hereby **GRANTED**.

I. Applicable Facts

In its order granting leave to file the present motion, the Court explained that it would limit its review to the matter of immunity, and would not consider the underlying merits of the Fourth Amendment claim. A review of the immunity issues, however, requires some consideration of the nature of the search in question. In reviewing a motion for summary judgment, the court must view the evidence and all justifiable inferences in the light most favorable to the nonmoving party, but the court may not make credibility determinations or weigh the evidence. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254-55 (1986); *see also Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). Following that rule, the relevant facts below are either undisputed or viewed in the light most favorable to Plaintiff.

It is undisputed that on August 16, 2003, approximately 30 officers of the Bibb County Sheriff's Office, acting on the orders of Defendant Sheriff Jerry Modena, conducted a raid on Plaintiff's business, Club Exotica. Several undercover officers paid admission to enter the

club as patrons. Inside, the officers observed behavior that they considered to be in violation of Georgia's public indecency (O.C.G.A. § 16-6-8) and masturbation-for-hire (O.C.G.A. § 16-6-16) statutes. This behavior is described in detail in the Court's original summary judgment order (Doc. 197, pp. 72-73) and need not be repeated here. In granting summary judgment as to Plaintiffs prior restraint claims, the Court has already determined that there was probable cause to make arrests for those alleged violations.

After they observed the alleged violations, the undercover officers signaled the officers waiting outside, members of the SWAT team and the drug task force. The officers entered the building, turned on the lights, and conducted a "protective sweep" of the premises. Club Exotica's manager, Mike Hutchins, has testified that the officers instructed to open locked doors, and that he observed officers opening drawers and looking through papers in the manager's office. Captain Godbee of the BCSO has testified that he asked an employee of Club Exotica to open the locked door to the manager's office, and that he observed inside the office a bulletin board in plain view, with photographs of the dancers attached to identifying information. Captain Godbee seized the photographs and information from the bulletin board. He denies looking through drawers and papers. Mr. Hutchins has also testified that the officers brought two dogs into the building and were observed opening the dancers' lockers. Sixteen dancers were arrested on misdemeanor charges, and citations were issued to twelve patrons. All were for violations of state law and no citations were issued for county ordinance violations.

II. Bibb County Sheriff's Office – Sovereign Immunity

Defendant Bibb County Sheriffs Office is entitled to summary judgment with regard to Plaintiffs Fourth Amendment claim because it is protected by the doctrine of sovereign immunity under the Eleventh Amendment. In this circuit it is "well-settled that Eleventh Amendment immunity bars suits brought in federal court . . . when an 'arm of the State" is sued." *Manders v. Lee*, 338 F.3d 1304, 1308 (11th Cir. 2003). "Whether a defendant is an 'arm of the state' must be assessed in light of the particular function in which the defendant was engaged when taking the actions out of which liability is asserted to arise." *Id.* There are four factors that courts must consider in determining whether an entity acts as an arm of the state in performing some particular function:

> (1) how state law defines the entity; (2) what degree of control the State maintains over the entity; (3) where the entity derives its funds; and (4) who is responsible for judgments against the entity.

Id. at 1309.

In *Manders,* the Eleventh Circuit considered in great detail the legal status of a county sheriff's office in the state of Georgia. Considering each of the four factors in sequence, the court concluded that a Georgia sheriffs office is an independent constitutional office created under the state constitution, over which the state legislature exercises exclusive authority. County commissioners have no authority to dictate policy or direct the actions of a sheriff. Although each county bears "the major burden of funding" for the county sheriff's office, state law mandates

minimum salaries for the sheriff and requires the county to "provide reasonably sufficient funds to allow the sheriff to discharge his legal duties." *Id.* at 1323 (quoting *Chaffin v. Calhoun,* 415 S.E.2d 906, 908 (Ga. 1992). The "'county commission may not dictate to the sheriff how that budget will be spent in the exercise of his duties.'" *Id.* (quoting *Chaffin,* at 907). In addition, the court in *Manders* noted that "Georgia courts speak with unanimity in concluding that a defendant county cannot be held liable for the tortious actions or misconduct of the sheriff or his deputies and is not required to pay the resulting judgments." *Id.* at 1326. The analysis of these four factors is in all respects the same in the present case as in *Manders.*

If this case is to be distinguished from *Manders,* it is only to make more clear that the sheriff's office was acting as an arm of the state. *Manders* concerned a claim of excessive force by an inmate in the county jail. Maintaining custody of inmates in a county jail is the third of the three primary duties that state law delegates to sheriffs. Law enforcement is the first. *Id.* at 1312. Under Georgia law, law enforcement is a duty delegated by the state alone:

> sheriffs in Georgia derive their power and duties from the State, are controlled by the State, and counties cannot, and do not, delegate any law enforcement power or duties to sheriffs. In Georgia, this historical role of the sheriff thus continues to this day as the sheriff directly represents the sovereignty of the State, has no superior in his county, and performs state functions for the sovereign in enforcing the laws and keeping the peace.

Id. at 1313. A sheriff's power to make arrests for violations of state law is central to his role as an arm of the state. Thus, the conclusion of *Manders* with regard to a use-of-force policy in a county jail applies equally to the exercise of the sheriff's law enforcement powers in this case. Eleventh Amendment immunity protects the Bibb County Sheriff's Office from suit in federal court for its actions in carrying out arrests for violations of state law.

III. Bibb County Board of Commissioners – Respondeat Superior

There can be no liability against the Bibb County Board of Commissioners ("the County") in this case because there is no evidence to show that the alleged Fourth Amendment violation was directly caused by any act, policy, or custom of the County. Section 1983 does not permit liability based on *respondeat superior. Monell v. Dep't of Soc. Servs.,* 436 U.S. 658, 694. As noted above, the deputies of the Sheriff's Office who executed the raid on Club Exotica were not even employees of the County, but rather of an independent constitutional body. The County lacked authority to establish policies or customs for the Sheriff's Office or its deputies. There is no evidence that any employees or agents of the County took part in the raid.

IV. Sheriff Jerry Modena – Qualified Immunity

Plaintiff's claims against Sheriff Jerry Modena in his individual capacity fail to pierce the protection of qualified immunity. Qualified immunity provides "complete protection for government officials sued in their individual capacities as long as 'their conduct violates no clearly

established statutory or constitutional rights of which a reasonable person would have known.'" *Thomas v. Roberts,* 261 F.3d 1160, 1170 (11th Cir. 2001) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982)). To determine whether an individual officer is protected by qualified immunity, the Court must first determine whether the officer's conduct violated a constitutional right, and then consider whether that constitutional right was "clearly established" *Id.* (quoting *Saucier v. Katz,* 533 U.S. 194, 201 (2001)).

Plaintiff has failed to present evidence that Sheriff Modena, in his individual capacity, violated Plaintiff's Fourth Amendment rights. It is undisputed that Sheriff Modena was not present for the raid on Club Exotica. He did not personally participate in the alleged search of the manager's office. The evidence indicates that Sheriff Modena authorized the surveillance and raid of Club Exotica and ordered his deputies* to make appropriate arrests for any violations of state law that were observed at the Club. The Court has already ruled that there was probable cause to make such arrests and that the raid itself was not a prior restraint on free expression. There is no evidence that Sheriff Modena specifically ordered the alleged search of the manager's office, nor is there evidence that any policy or custom for which he was responsible directly led to the search being performed. In the absence of such evidence, he cannot be held liable merely on the basis of *respondeat superior.*

V. John Doe

After more than three years of discovery, extensive depositions, and court hearings in this case, Plaintiff has

yet to identify John Doe. Plaintiff's Response to the current Motion for Summary Judgment suggests that John Doe is Sheriff Modena. Response, Doc. 206, p. 7. If John Doe is Sheriff Modena, summary judgment is appropriate for the reasons set forth above. If John Doe is another officer of the Bibb County Sheriff's Office, Plaintiff has failed to create any genuine issue of material fact as to his liability, as it has given the Court no information as to his identity and it has failed even to indicate what actions John Doe may have taken in violation of Plaintiff's Fourth Amendment rights.

VI. Conclusion

For the reasons set forth above, the Court finds that Defendants are entitled to judgment as a matter of law with regard to Plaintiff's claim for violation of the Fourth Amendment's prohibition of unreasonable searches and seizures. Following this order and the Court's earlier summary judgment order, no further matters remain for decision. The Clerk of Court is hereby directed to enter judgment, in Defendants' favor, as to all counts.

SO ORDERED, this 15th day of March, 2006.

/s/ C. Ashley Royal
C. ASHLEY ROYAL
UNITED STATES
DISTRICT JUDGE

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-12268-II

2025 EMERY HIGHWAY, L.L.C.,
d.b.a. Club Exotica,

Plaintiff-Appellant,

versus

BIBB COUNTY, GA,
JOHN DOE, in his official capacity with the
Bibb County Sheriff's office,
JERRY M. MODENA, SR., Sheriff, in his official
Capacity as the Sheriff of Bibb County,

Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Georgia

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

(Filed May 1, 2007)

Before: TJOFLAT, HULL and COX, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ E.R. Cox
UNITED STATES CIRCUIT JUDGE

BIBB COUNTY CODE

(1993)

ARTICLE III.
ADULT ENTERTAINMENT REGULATIONS*

Sec. 3-71. [Obscene, lewd or indecent entertainment on premises where alcoholic beverages are offered for sale.]

(a) *Findings; public purpose.* Based on the demonstrated experience of other urban counties and municipalities, including but not limited to Atlanta and Fulton County, Georgia; DeKalb County, Georgia; Orange County, Florida; Indianapolis, Indiana; Los Angeles, California; Beaumont, Texas; Phoenix, Arizona; St. Paul, Minnesota; and Austin, Texas, which experience is found to be relevant to the problems that face the Bibb County, Georgia and based on the documentary evidence and oral testimony presented at the public safety committee meeting by citizens, a number of whom are familiar with conditions resulting in other localities, and experts, the board of commissioners takes note of the notorious and self-evident conditions and secondary effects attendant to the commercial exploitation of human sexuality, which do not vary greatly among the various communities within our country, particularly the problems of crime, blight, and deterioration which are brought about by alcohol and live nudity.

It is the finding of the board that public nudity (either partial or total) under circumstances related to the sale and consumption of alcoholic beverages in so-called "nude bars" or establishments offering so-called "nude entertainment"

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* **Cross reference** – Offenses and miscellaneous provisions, ch. 12. **State law reference** – Public indecency, O.C.G.A. § 16-6-8.

or "adult entertainment" in conjunction with the sale of alcoholic beverages, begets criminal behavior and tends to create undesirable community conditions.

Among the acts of criminal behavior found to be associated with nudity and alcohol are disorderly conduct, prostitution, public indecency and drug trafficking. Among the undesirable community conditions identified with the concentration of adult entertainment are depreciation of property values in neighborhoods surrounding nude bars or adult entertainment establishments where alcoholic beverages are sold, increased expenditure for and allocation of law enforcement personnel to preserve law and order, increased burdens on the judicial system as a consequence of the criminal behavior hereinabove described, and acceleration of community blight by the concentration of adult entertainment establishments in particular areas.

Other negative effects which are found by the board are the apparent connection of these establishments to organized crime and illegal drug sales; the potential spread of communicable diseases to law enforcement personnel who answer calls at adult establishments and to patrons of such establishments; and the potential proliferation of adult entertainment establishments after the initial siting of an adult entertainment establishment in a particular neighborhood.

The board therefore finds that it is in the best interest of the health, welfare, safety and morals and preservation of its businesses, neighborhoods, and of churches, schools, and parks to prevent the adverse impact of adult entertainment establishments. Therefore, the board finds that the prohibition of live nude conduct in establishments

licensed to serve alcohol for consumption on the premises is in the public welfare by furthering legitimate government interests, such as reducing criminal activity, protection against property devaluation and deterioration, and eliminating undesirable community conditions normally associated with establishments which serve alcohol and allow and/or encourage nudity, and that such prohibition will not infringe upon the protected constitutional rights of freedom of speech. To that end, this section is hereby adopted.

(b) *Definitions.* As used in this section, the following words shall have the meaning as set forth below unless otherwise required by context.

(1) *Alcoholic beverages* means and includes all alcohol, distilled spirits, beer, malt beverage, wine or fortified wine as more specifically defined in section 3-1 of this Code.

(2) *Business establishment* means a business within the county where alcoholic beverages are offered for sale for consumption on the premises pursuant to a license issued by the governing body.

(3) *Licensee* means any person to whom a license for sale for consumption on the premises of alcoholic beverages has been issued by the governing body, including the officers and agents of the licensee.

(4) *License* means a license for sale for consumption on the premises of alcoholic beverages issued by the governing body.

(5) *Live* means any activity or entertainment which is carried on by actual living persons in the physical presence of the patrons.

(6) *Live entertainment* means entertainment for the benefit of patrons which is carried on in the actual physical presence of such patrons, including, but not limited to dancing.

(7) *Mainstream performance house* means a theater, concert hall, auditorium or similar establishment which regularly features live performances such as plays or concerts which are not distinguished or characterized by an emphasis on the depiction, description or display or the featuring of specified anatomical areas or specified sexual activities and where such depiction, if any, is only incidental to the primary purpose of any performance.

(8) *Person* means a human being. See section 1-2 of the Bibb County Code.

(9) *Premises* means the definite closed or partitioned establishment, whether room, shop or building wherein alcoholic beverages are sold or consumed, including the sidewalk serving area or outside, open air or patio-type serving area on the private property of an establishment, as defined in section 3-1 of this Code.

(10) *Specified anatomical areas* means any of the following:

a. Less than completely and opaquely covered human genitals or pubic region; cleft of the buttocks; or any portion of the female breast encompassed within an area falling below the horizontal line one would have to draw to intercept a point above the top of the areola, or any portion of the areola, or any simulation thereof. This definition shall include the entire lower portion of the human female breast, but shall not include any portion of

the cleavage of the human female breast exhibited by a dress, blouse, shirt, leotard, bathing suit, or other wearing apparel, provided the areola is not so exposed.

b. Human male genitalia in a discernibly turgid state, even if completely and opaquely covered.

(11) *Specified sexual activities* means and includes any of the following:

a. The fondling or other erotic touching of human genitals, pubic region, buttocks, anus or female breasts;

b. Sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation or sodomy;

c. Masturbation, actual or simulated;

d. The displaying of the male or female pubic hair, anus, vulva or genitals; or

e. Excretory functions as part of or in connection with any of the activities set forth in a. through d. above.

(c) *Conduct prohibited.* The following types of entertainment, attire and conduct are prohibited upon any premises licensed to sell, serve or dispense alcoholic beverages for consumption on the premises within the county:

(1) The employment or use of any person live, in any capacity, in the sale or service of alcoholic beverages or food while such person is unclothed or in such attire, costume or clothing, as to expose any portion of his or her specified anatomical areas.

(2) Live entertainment where any person appears unclothed or in such attire, costume or clothing as to expose any portion of his or her specified anatomical areas or where such person performs acts of specified sexual activities or acts which simulate specified sexual activity, as defined herein.

(3) The holding, promotion, sponsoring or allowance of any contest, promotion, special night, event or any other activity where live patrons of the licensed establishment are encouraged or allowed to engage in any of the conduct proscribed in subsections (1) and (2) above.

(4) Nothing contained in this section shall apply to the premises of any mainstream performance house or museum which derives less than twenty (20) percent of its gross annual income from the sale of alcoholic beverages.

(Ord. No. FF-93-9, § 2, 3-16-93)

BIBB COUNTY CODE

(2002)

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(7) *Person* means a human being. See section 1-2 of the Bibb County Code.

(8) *Premises* means the definite closed or partitioned establishment, whether room, shop or building wherein alcoholic beverages are sold or consumed, including the sidewalk serving area or outside, open air or patio-type serving area on the private property of an establishment, as defined in section 3-1 of this Code.

(9) *Specified anatomical areas* means any of the following:

a. Less than completely and opaquely covered human genitals or pubic region; cleft of the buttocks; or any portion of the female breast encompassed within an area falling below the horizontal line one would have to draw to intercept a point above the top of the areola, or any portion of the areola, or any simulation thereof. This definition shall include the entire lower portion of the human female breast, but shall not include any portion of the cleavage of the human female breast exhibited by a dress, blouse, shirt, leotard, bathing suit, or other wearing apparel, provided the areola is not so exposed.

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b. Sex acts, normal, or perverted, actual or simulated, including intercourse, oral copulation or sodomy;

c. Masturbation, actual or simulated;

d. The displaying of the male or female pubic hair, anus, vulva or genitals; or

e. Excretory functions as part of or in connection with any of the activities set forth in a. through d. above.

(11) *Traditional or live theater* (mainstream performance house) shall be defined as this term is defined in chapter 6, article IV, section 6-72(14).

(c) *Conduct prohibited.* The following types of entertainment, attire and conduct are prohibited upon any premises licensed to sell, serve or dispense alcoholic beverages for consumption on the premises within the county:

(1) The employment or use of any person live, in any capacity, in the sale or service of alcoholic beverages or food while such person is unclothed or in such attire, costume or clothing, as to expose any portion of his or her specified anatomical areas.

(2) Live entertainment where any person appears unclothed or in such attire, costume or clothing as to expose any portion of his or her specified anatomical areas or where such person performs acts of specified sexual activities or acts which

simulate specified sexual activity, as defined herein.

(3) The holding, promotion, sponsoring or allowance of any contest, promotion, special night, event or any other activity where live patrons of the licensed establishment are encouraged or allowed to engage in any of the conduct proscribed in subsections (1) and (2) above.

(4) The prohibition against display of "specified anatomical areas" shall not apply to the premises of any traditional or live performance house, museum, theater, concert hall, opera house, educational institution or similar establishment, which regularly features legitimate live performances, including plays, operas, ballets, concerts or other similar performances, and which derives less than 20 percent of its gross annual revenue from the sale of alcoholic beverages. It is the intent of this section to require that any establishment seeking to qualify as a traditional theater must first meet the definition of traditional or live theater (mainstream performance house), as defined in chapter 6, article IV, section 6-72(14) of the Code of Bibb County, Georgia, and, secondly, derive less than 20 percent of its gross annual revenue from the sale of alcoholic beverages. If the cost of admission to the establishment, whether by cover charges or ticket, entitles the patrons to free drink(s), then the revenue generated by the ticket sale or cover charge is to be included in the anneal revenue from the sale of alcoholic beverages.

(Ord. No. FF-93-9, § 2, 3-16-93; Ord. No. OO-02-8, §§ 1, 2, 5-14-02)

O.C.G.A. § 16-6-8. Public indecency

(a) A person commits the offense of public indecency when he or she performs any of the following acts in a public place:

(1) An act of sexual intercourse;

(2) A lewd exposure of the sexual organs;

(3) A lewd appearance in a state of partial or complete nudity; or

(4) A lewd caress or indecent fondling of the body of another person.

(b) A person convicted of the offense of public indecency as provided in subsection (a) of this Code section shall be punished as for a misdemeanor except as provided in subsection (c) of this Code section.

(c) Upon a third or subsequent conviction for public indecency for the violation of paragraph (2), (3), or (4) of subsection (a) of this Code section, a person shall be guilty of a felony and shall be punished by imprisonment for not less than one nor more than five years.

(d) For the purposes of this Code section only, "public place" shall include jails and penal and correctional institutions of the state and its political subdivisions.

(e) This Code section shall be cumulative to and shall not prohibit the enactment of any other general and local laws, rules, and regulations of state and local authorities or agencies and local ordinances prohibiting such activities which are more restrictive than this Code section.

O.C.G.A. § 16-6-16. Masturbation for hire

(a) A person, including a masseur or masseuse, commits the offense of masturbation for hire when he erotically stimulates the genital organs of another, whether resulting in orgasm or not, by manual or other bodily contact exclusive of sexual intercourse or by instrumental manipulation for money or the substantial equivalent thereof.

(b) A person committing the offense of masturbation for hire shall be guilty of a misdemeanor.